desirable institutions. And the courts should avoid placing limitations on corporations and laymen which unnecessarily hamper the freedom of the individual and the efficient development of the economic life of the community.

---

DOCTRINE OF UNCLEAN HANDS AS APPLIED TO THE PROTECTION OF TRADE NAMES. — "He who comes into equity must come with clean hands." A good illustration of how far this maxim is carried appears in *Howard* v. *Lovett*,[1] a recent Michigan case, where the defendant appropriated the name of the plaintiff's vaudeville act, which purported to be an exhibition of thought transference, and an injunction was refused on the ground that the act constituted a fraud on the public.

Though taken literally this maxim might be construed as covering any wrongdoing by the plaintiff, it is fundamental that it applies only where the misconduct is in connection with the particular subject which the plaintiff seeks to have litigated.[2] Even when thus qualified, numerous exceptions to the maxim have arisen. For instance, where a conveyance is made in trust by plaintiff to defendant for an illegal purpose, if it is shown that, though the plaintiff's action was illegal, it was instigated by the defendant for the express purpose of defrauding the plaintiff, — that is, where the parties are not *in pari delicto* — recovery has been allowed.[3] Likewise, where the illegal purpose has been abandoned by the plaintiff, a *locus penitentiae* is permitted.[4]

The question has frequently arisen in connection with the protection of a trade-mark where the plaintiff has been guilty of false representations to the public in connection with it. It has sometimes been held that where the misrepresentation does not appear in the trade name or label itself, but only in independent advertising, the fraud on the public is purely collateral, and will be no bar to an injunction.[5] Other cases, however, have required that the good will sought to be protected must not be built up on the misrepresentations. The latter seems a better test as to whether the fraud is collateral.[6] In many jurisdictions where the owner of the trade name has made fraudulent representations in connection therewith, no equitable relief will be given.[7] Where the plaintiff has been guilty of some fraudulent practice in his business, not particularly connected with the trade name, the fraud is clearly collateral, and relief will be given against infringement.[8]

In *Howard* v. *Lovett* the chief question seems to be as to what is necessary to create a fraud on the public. Closely analogous to these cases are cases at law as to what constitutes a fraudulent representation

---

[1] 165 N. W. 634.
[2] 1 POMEROY, EQUITY JURISPRUDENCE (2 ed.), § 399.
[3] 1 *Ibid.*, § 403; WOODWARD, QUASI-CONTRACTS, § 138.
[4] Carll *v.* Emery, 148 Mass. 32, 18 N. E. 574.
[5] Wormser *v.* Shayne, 111 Ill. App. 556; Curtis *v.* Bryan, 36 How. Pr. (N. Y.) 33; Ford *v.* Foster, L. R. 7 Ch. 611, (1872).
[6] Johnson & Johnson *v.* Seabury & Johnson, 71 N. J. Eq. 750, 67 Atl. 36.
[7] Kahler Manufacturing Co. *v.* Beechore, 59 Fed. 572; Hillson Co. *v.* Foster, 80 Fed. 896; Seabury *v.* Grosvenor, Fed. Cas. No. 12576.
[8] Heller & M. Co. *v.* Shaner, 102 Fed. 882.

by the seller. In fact, there is some authority that the injunction will be denied only where the misrepresentations would constitute a defense to an action at law.[9] At law, the doctrine of "seller's talk" in advertising his goods is recognized, and though the tendency is toward narrowing this principle, many statements of opinion which are very close to the line of actual misrepresentations are allowed, though less is required for inequitable conduct than for actual fraud. That something of the same principle is recognized in equity may be seen in numerous cases.[10] The case under discussion seems one particularly suited for the application of such a principle. The plaintiff's business is one in which truth as to surrounding circumstances is often disregarded, and the public is well aware of this. It is hardly conceivable that any great number of the public would be deceived by a trick such as the plaintiff's any more than by a magician. Acts of this kind are a common and well-understood part of American vaudeville. The public wants to be deceived as part of the show. The denial of relief in this case pushes the doctrine of "unclean hands" to an extreme point. The judges of a court of chancery, however, are frequently of a loftier moral character than the components of a jury, and this perhaps explains in part why conduct of a more scrupulous character is more often required in equity than at law.[11]

---

# RECENT CASES

ADMINISTRATIVE LAW — REVIEW OF ADMINISTRATIVE PROCEEDINGS ON *CERTIORARI*. — A statute provided that the state printing board should award the state printing contract to the lowest responsible bidder. (1909, N. Y. LAWS, c. 60, § 6.) The board awarded the contract to the second lowest bidder, and the lowest bidder seeks to have the proceedings reviewed on *certiorari*. *Held*, that the writ will not lie. *People ex rel. Argus Co.* v. *Hugo*, 168 N. Y. Supp. 25.

By the general common-law rule *certiorari* will lie to review only such proceedings of an administrative body as are judicial in their nature. *Degge* v. *Hitchcock*, 229 U. S. 162. See 1 BAILEY, HABEAS CORPUS, § 171. This rule is recognized in all jurisdictions except New Jersey. *Treasurer* v. *Mulford*, 26 N. J. L. 49. In North and South Dakota the New Jersey exception has been established by statute. *State* v. *Clark*, 21 N. D. 517; *State* v. *Hughes County*, 1 S. D. 292. The line of demarcation between judicial and nonjudicial proceedings is obscure. For the purposes of the present problem a distinction should be drawn between the questions whether an administrative body in acting

---

[9] Ford *v.* Foster, *supra*.

[10] Newbro *v.* Undeland, 69 Neb. 821, 96 N. W. 635 (Claims that a hair-restorer is an absolute cure for baldness are mere statements of opinion). California Fig Syrup Co. *v.* Worden, 95 Fed. 132 (Court declined to investigate truth of advertisement that compound is a sure cure for constipation). Samuel Brothers *v.* Hostetter Co., 118 Fed. 257.

[11] M. D. Chalmers, "Trial by Jury in Civil Cases," 7 L. QUART. REV. 15, 19 ("But the morality of juries is a sublunary, man-in-the-street sort of morality. It is wholly distinct from the sublimated morality of non-jury tribunals such as courts of equity").